STATE OF MICHIGAN

COURT OF APPEALS

PAUL L. ROMIG,

Plaintiff-Appellant,

v

NORFOLK SOUTHERN RAILWAY COMPANY, CONSOLIDATED RAIL CORPORATION, CONRAIL SHARED ASSETS, AMERICAN PREMIER UNDERWRITERS, INC, and CSX TRANSPORTATION, INC,

Defendants-Appellees.

UNPUBLISHED
July 7, 2011

No. 297040
Wayne Circuit Court
LC No. 09-007565 NO

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Plaintiff, a former railway worker, brought negligence claims against his various employers under the Federal Employers Liability Act (FELA), 45 USC 51 *et seq*. The trial court dismissed his claims, holding that plaintiff knew or should have known of his potential claims more than three years prior to filing suit, in violation of the applicable statute of limitations. For the reasons set forth in this opinion, we affirm.

I. FACTUAL BACKGROUND

Plaintiff worked for each of the defendants from 1970 until 2008 as a laborer and equipment operator in their respective track departments. In May 2008, Dr. Ralph Ribaudo diagnosed plaintiff with spine damage at multiple locations. As a result, plaintiff was forced to retire. On March 31, 2009, plaintiff filed suit, alleging that defendants were negligent under the FELA, and asserting that the nature of his work for defendants caused him a cumulative injury to his back.

At his deposition, plaintiff testified that he always had trouble with his back, dating from his job as a bagboy at Meijer before going to work for the railroad. In the draft plaintiff was also classified 4-F, or not acceptable for service, because of his back. Plaintiff testified that his back problems slowly worsened throughout his tenure working for defendants:

> *Q.* Are the problems that you had back in the '70s about the same as the problems that you have now?

A. Pretty much.

Q. And you knew from back in the '70s right up until you retired that if you had a hard day at work it was going to affect your back?

A. Right.

Q. And by affect your back, meaning make your back sore.

A. Yeah, sore, right.

Q. And that's essentially the problem you have today is a sore back?

A. Right.

Plaintiff agreed that he could not think of anything other than his job that would have caused his back problems. Further, he stated that two different doctors told him, sometime during the 80s or 90s, that his job was causing his back problems.

It is clear from plaintiff's testimony that his memory is not perfect. He admitted that he had trouble remembering things beginning about a year before the deposition. His wife testified that she believed plaintiff was suffering the early stages of Alzheimer's disease. However, she also admitted that plaintiff did not have hallucinations or remember things that did not happen; he only failed to remember things that did happen. Plaintiff has not been diagnosed with Alzheimer's. In addition, at plaintiff's deposition, the following exchange took place:

Defense Counsel. Mr. Schneller, given some of [plaintiff's] answers and his difficulty with memory, are you claiming that he's not competent to testify today?

Plaintiff's Counsel. I do not believe that I am, and I believe that he's been able to answer most of your questions as best as possible.

Plaintiff's wife also asserted that plaintiff had never seen a doctor for his back. She admitted, though, that she did not go to all of plaintiff's doctor's appointments, and that she never went into the examining room with him. She conceded that she does not know what a doctor might have told him when she was not there. She also testified that plaintiff was not a complainer, and may not have told her about back problems even if he was experiencing them.

II. PLAINTIFF'S COMPETENCY

Plaintiff first argues that his own testimony should not be accepted because the trial court did not hold a competency hearing. We adjudicate FELA claims in state court according to federal substantive law and state procedural rules. *Hughes v Lake Superior & Ishpeming R Co*, 263 Mich App 417, 421; 688 NW2d 296 (2004). A trial court's decision that a witness is competent to testify will not be overturned unless it constitutes an abuse of discretion. *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998). A decision is an abuse of discretion if it falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372,

388; 719 NW2d 809 (2006). Under MRE 601, a witness is competent unless the court finds that he "does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably." See also *Breck*, 230 Mich App at 457.

Plaintiff submits that, at a minimum, the trial court should have held a hearing to determine his competency. Plaintiff cites *Bowdle v Detroit Street Ry Co*, 103 Mich 272, 275; 61 NW 529 (1894), for the proposition that if a question is raised regarding a witness's competence, a trial court must examine the witness to determine whether he is competent. The record before this Court does not reveal that plaintiff ever requested such a hearing. It appears that the trial court mentioned competency in response to plaintiff's argument that his poor memory created an issue of fact regarding knowledge of his injury. A party may not complain of error to which he contributed by plan or negligence. *Genna v Jackson*, 286 Mich App 413, 422; 781 NW2d 124 (2009). Further, the trial court reviewed plaintiff's and his wife's deposition testimony in making its determination that plaintiff was competent. Plaintiff does not explain what more the trial court would have learned by conducting an additional hearing on the matter.

There is no evidence that plaintiff was incapable of testifying truthfully or that he lacked a sense of obligation to do so. The record of plaintiff's deposition supports his lawyer's statement that plaintiff answered the questions as best as he was able. Plaintiff has not been diagnosed by a medical professional as having Alzheimer's disease. Nor would such a diagnosis necessarily mean plaintiff was not competent to testify. Though there may be gaps in plaintiff's memories, his wife testified that he does not fabricate memories. Plaintiff has not presented this Court with any authority to suggest that a less than perfect memory is sufficient to disqualify a witness, rather than simply impacting the credibility of the testimony. Under these circumstances, the trial court did not abuse its discretion by considering plaintiff's deposition testimony.

III. STATUTE OF LIMITATIONS

Plaintiff contends that there remains a question of fact regarding when he learned of his injury and its connection to his work, precluding summary disposition. We review de novo a trial court's decision granting summary disposition under MCR 2.116(C)(7). *Guerra v Garratt*, 222 Mich App 285, 288; 564 NW2d 121 (1997).

> When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact. If no facts are in dispute, and reasonable minds could not differ on the legal effect of those facts, whether the plaintiff's claim is barred by the statute of limitations is a question for the court as a matter of law. [*Id.* at 289].

Negligence claims under FELA must be brought within three years after the cause of action accrues. 45 USC 56. Michigan courts apply the discovery rule in determining whether the statute of limitations has expired. *Hughes*, 263 Mich App at 423. Under this rule, a plaintiff is not "injured" until he "knows or has reason to know of the existence and cause of the injury which is the basis of his action." *Id.* at 424, quoting *Urie v Thompson*, 337 US 163, 170; 69 S Ct

1018; 93 L Ed 1282 (1949). The plaintiff "should have known" the cause of his injury if it would have been revealed through the exercise of reasonable diligence. *Hughes*, 263 Mich App at 428.

Even when considered in his favor, the testimony shows that plaintiff knew or should have known of his injury and its cause more than three years before he filed suit. Plaintiff argues that there is a difference between having sore muscles after a hard day's work and having serious spinal damage. However, plaintiff testified that he has suffered from the same back pain since he was a teenager, and that the pain has always been associated with his work. Moreover, he testified that a doctor confirmed the connection between the pain and his work sometime in the 80s or 90s. We concur with the trial court that plaintiff's wife's assertions do not raise a question of fact.

There is no evidence to suggest that plaintiff's current issues are different from his prior complaints. Plaintiff admitted that he has known of his injury and its cause since at least the 90s, ten years or more before he filed suit. Therefore, the trial court correctly ruled that his suit is barred by the statute of limitations.

Affirmed. Defendants, having prevailed in full, may tax costs pursuant to MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad